UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAPTIST HEALTH NURSING AND REHABILITATION CENTER, INC.

and **Cases 03-CA-153365**
03-CA-160251

1199 SEIU UNITED HEALTHCARE WORKERS EAST

GENERAL COUNSEL'S REPLY BRIEF

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Reply Brief in the above-captioned cases.

I. INTRODUCTION

In its Answering Brief, Respondent argues that the Board should not readopt the rationale in *Alan Ritchey*, 359 NLRB No. 40 (2012). Most of Respondent's arguments that are set forth in its Answering Brief are already addressed in the General Counsel's Brief in Support of Exceptions.[1] Thus, it is respectfully submitted that the Board readopt the rationale in *Alan Ritchey* and order the standard remedies involving unilateral changes including reinstatement, backpay with interest, and an order to bargain with the Union about the disciplines issued to Carmel Sparks and Yadira Lambert. It is further submitted that awarding search-for-work and work-related expenses are also appropriate.

[1] Throughout this brief the following references will be used: GC Brief at ___ for General Counsel's Brief in Support of Exceptions at page number; and R. Brief at ___ for Respondent's Answering Brief at page number.

II. ARGUMENT

A. The ALJ failed to perform a witness credibility analysis and refused to make a finding regarding the discretionary nature of the disciplines, including the administrative suspension, issued to Carmel Sparks and Yadira Lambert. (Exceptions 1, 3, and 4)

In its Answering Brief, Respondent asserts that credibility determinations are not required where the ultimate determination in the proceeding does not depend on credibility. Respondent argues that in *The Fresno Bee*, 339 NLRB 1214 (2003), the Board held that the employer does not have an obligation to provide advance notice and an opportunity to bargain with a newly certified bargaining representative before imposing discipline, irrespective of whether the disciplinary action is discretionary or non-discretionary. However, since *Fresno Bee* was demonstrably incorrect, a witness credibility analysis is necessary to make credibility findings, especially where there are discrepancies in the testimony about whether the disciplines issued to Sparks and Lambert were discretionary. These discrepancies include, among others, whether Sparks had good cause to leave her shift on May 15, 2015 (thereby not job abandonment) and whether Lambert was informed by Respondent that it was okay to be taken off the schedule for her August 2, 2015 shift (thereby not a no-call no-show absence).

Additionally, in its Answering Brief, Respondent asserts that with respect to Sparks, Respondent placed her on leave during the investigation, in part, to protect patient safety. However, this assertion is belied by the fact that Respondent allowed Sparks to work a few days after the May 15 incident.

These discrepancies affect the outcome of the case, as they support a finding of whether the disciplinary actions were discretionary, which is required to find a violation under the *Alan Ritchey* rationale. However, as noted in General Counsel's Brief in Support of Exceptions, despite the ALJ's failure to perform a witness credibility analysis, it is respectfully submitted

that there is sufficient evidence to find that Respondent's disciplines of Sparks and Lambert were discretionary, in part, due to Respondent's investigations and the fact that there are conflicting versions of the facts regarding each of the disciplines for Sparks and Lambert. (*See* GC Brief at 15-17). Thus, since the disciplines (including the administrative suspensions) were discretionary, Respondent's failure to notify and bargain with the Union violates Section 8(a)(1) and (5) of the Act.

B. The Board Should Adopt the Sound Rationale of the *Alan Ritchey* Decision. (Exception 2)

Respondent argues in its Answering Brief that since the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), invalidated *Alan Ritchey*, 359 NLRB No. 40 (2012), *Alan Ritchey* "cannot be relied upon to establish a violation of the Act as alleged in the Consolidated Complaint." (R. Brief at 15). However, while the Supreme Court vacated *Alan Ritchey* (and several other Board decisions) it did not actually weigh in on the reasoning or facts of *Alan Ritchey*. Thus, it is respectfully submitted that the Board adopt the sound rationale of the *Alan Ritchey* decision since *Alan Ritchey*'s reasoning was based on long-standing and well-settled principles that employers must notify and bargain with the union before they impose discretionary changes that impact mandatory subjects of bargaining.

More specifically, the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962), confirmed that "an employer's unilateral change in conditions of employment under negotiation is […] a violation of [Section] 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743. When an employer recognizes a union as its employees' exclusive collective-bargaining representative, that employer has two primary duties under *Katz*. First, it must refrain from making changes to preexisting terms and conditions of employment without bargaining to agreement or impasse.

Second, it must bargain over any *application* of those preexisting terms and conditions "[…] to the extent that discretion has existed in determining" how to apply those conditions to employees. *Oneita Knitting Mills*, 205 NLRB 500, 501 n.1 (1973). Thus, the Board's vacated decision in *Alan Ritchey* is merely the natural outflow of those cases, holding that an employer's discretionary application of discipline – up to and including termination – is not exempt from these bedrock requirements of initial bargaining.

In its Answering Brief, Respondent cites to other recent ALJ decisions in which said ALJs refused to apply *Alan Ritchey*'s rationale. (*See* R. Brief at 16-17). However, while *Alan Ritchey* itself may have vanished in the wake of *Noel Canning*, its reasoning remains untouched and the fact that some ALJs have refused to apply *Alan Ritchey* in no way undermines the underlying rationale of *Alan Ritchey*. These decisions only show that until the Board weighs in on the issue post-*Noel Canning*, different ALJs may find different rationales persuasive. Indeed they have, as highlighted in the General Counsel's Brief in Support of Exceptions. (*See* GC Brief at 12-13).

Additionally, in its Answering Brief, Respondent relies on *Wabash Transformer Corp.*, 215 NLRB 546 (1974), in support of its argument that the Board should not readopt the *Alan Ritchey* rationale. However, Respondent's reliance on *Wabash* is misplaced. In *Wabash*, the Board reversed the ALJ and found that the employer did not violate Section 8(a)(1) and (5) of the Act, when the employer imposed the penalty of discharge for failure to meet its efficiency production standards. *Id.* at 546. The Board found that the employer did not promulgate new productivity rules or standards and thus concluded that the discharge sanction was merely one means of enforcing the preexisting production standards. *Id.* at 546-547.

However, in the instant case, Respondent clearly exercised discretion when issuing the disciplines to Sparks and Lambert. Specifically, resolving issues of fact and determining "good cause," by their very nature, require discretion. Thus, since the disciplines were discretionary, Respondent was required to notify and bargain with the Union. *See, e.g.*, *Washoe Medical Center Inc.*, 337 NLRB 202, 202 (2001) (although employer had a practice of placing new employees into wage range quartiles, employer's substantial degree of direction exercised in deciding which range to place employees in required bargaining with the union prior to implementation); *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999) (employer's recurring unilateral reduction in employees' hours of work required bargaining because there was no reasonable certainty as to the timing and certainty of a reduction in hours); *Adair Standish Corp.*, 292 NLRB 890 n.1 (1989) (employer required to bargain economic layoffs because layoff decision was not based on seniority but rather the employer's assessment of the employees' ability); *Oneita Knitting Mills*, 205 NLRB 500, 500 (1973) (while employer was obligated to maintain its merit increase program, employer was required to bargain the timing and amount of such increases).

In its Answering Brief, Respondent also attempts to shift the bargaining burden to the Union by arguing that the Union learned of the suspension and termination of Carmel Sparks and Yadira Lambert shortly after each occurrence but did not request bargaining with respect to these actions. However, the decision to discipline Sparks and Lambert had already been made by the time the Union was made aware of the act. Asking the Union to request bargaining, after the decisions had been made, would be meaningless. Indeed, "[n]o genuine bargaining over a decision can be conducted where that decision has already been made and implemented." *Town & Country Manufacturing Co., Inc.*, 136 NLRB 1022, 1030 (1962) (restoring operations and

reinstating discharged employees with backpay as remedy for unlawful unilateral subcontracting of those operations), enforced, 316 F.2d 846 (5th Cir. 1963). Moreover, only requiring Respondent to provide notice about unilateral changes *after* the fact relegates the Union "to the status of a supplicant, a position incompatible with the purposes and policies of the Act." *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000).

C. Remedies of reinstatement, expungement, backpay, interest, search-for-work and work-related expenses are appropriate and should be ordered by the Board. (Exceptions 5-6)

When an employer violates Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment, the Board orders the employer to restore the status quo ante by, among other things, reinstating and making whole discharged employees and rescinding discipline where the discharges or discipline resulted from the unlawful unilateral change. These remedies are necessary to prevent Respondent from retaining the "fruits" of its violations of the Act and to offset the effects of the unfair labor practices on the Union's bargaining position. *See Beacon Piece Dyeing and Finishing Co., Inc.* 121 NLRB 953, 963 (1958); *Die Supply Corporation,* 160 NLRB 1326, 1344 (1966).

In *Alan Ritchey,* the Board determined that the retroactive application of these remedies would be inappropriate, even though the discretionary discipline pre-dated the decision in *Fresno Bee,* 337 NLRB 1161 (2002), in which the Board simply adopted an administrative law judge's decision that an employer had no preimposition duty to bargain over discretionary discipline. 359 NLRB No. 40, slip op. at 11. The *Alan Ritchey* Board reasoned that at the time the employer in that case imposed discipline, Board precedent was essentially silent on the issue of a duty to engage in bargaining before the imposition of discipline, and expressed concern that employers would be caught by surprise and be exposed to significant financial liability if its decision was applied retroactively and backpay was awarded. *Id.* Thus, the Board applied its holding only

prospectively, and did not remedy the unlawful failure to bargain before the imposition of discipline. *Id.*

In *Alan Ritchey*, the Board clearly contemplated these remedies on a prospective basis. As noted above, the *Alan Ritchey* Board's rationale for not applying its holding retroactively was that it could impose an unexpected backpay burden on employers. More importantly, if reinstatement, backpay, and the other standard remedies for unlawful discharges were not imposed, employers would have no incentive to engage in preimposition bargaining over discipline, and the new rule announced in *Alan Ritchey* would be meaningless.

In this case, Respondent's refusal to notify and bargain with the Union regarding Respondent's discipline of employees Sparks and Lambert occurred after the Board's *Alan Ritchey* decision. Thus, at the time of all of the disciplines involved in the instant case, Respondent cannot claim surprise. While the disciplines issued after *Noel Canning*, the rationale of *Alan Ritchey* remains sound. Thus, Respondent was on notice regarding the *Alan Ritchey* rationale and prospective application, and chose to simply ignore its bargaining obligation.

Thus, it is respectfully submitted that the Board order Respondent to impose the traditional Board remedies for unlawful discharges: offers of reinstatement to Carmel Sparks and Yadira Lambert, remove the unilaterally imposed suspensions and discharges of Sparks and Lambert from its files, and make them whole for any losses they suffered as a result of these actions, by payment of backpay and interest compounded daily. Respondent should also be ordered to compensate Sparks and Lambert for, among other things, search-for-work and work-related expenses that they have incurred as a result of their unlawful termination for all of the reasons asserted in the General Counsel's Brief in Support of Exceptions.

III. CONCLUSION

General Counsel respectfully requests that the ALJ's findings of fact, analysis, and conclusion should be reversed and modified as reflected by General Counsel's Exceptions, and that the recommended remedy and order be modified to include all the remedies sought by the General Counsel in the Consolidated Complaint, and any other remedies as deemed appropriate by the Board.

DATED at Buffalo, New York, this 6th day of May, 2016.

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